88-411

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

**EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS, et al.,**
Petitioners,

v.

JOSEPH M. GIARRATANO, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MARY SUE TERRY
Attorney General of Virginia

H. LANE KNEEDLER
Chief Deputy Attorney General

STEPHEN D. ROSENTHAL
Deputy Attorney General

* ROBERT Q. HARRIS
Assistant Attorney General

RICHARD F. GORMAN, III
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-4624

* *Counsel of Record*

Appellate Printing Services • Heritage Bldg. • 10th & Main • Richmond, VA 23219 • (804) 643-7789

QUESTION PRESENTED

Does the right of "meaningful access to the courts" require states to provide a personal lawyer to represent an inmate who desires to attack a death sentence in state habeas corpus proceedings notwithstanding this Court's rulings that the United States Constitution does not provide a right to post-conviction counsel, that no preferred status for death row inmates in post-conviction matters is constitutionally required, and that states may meet their obligation of providing access to the courts in exactly the way Virginia has chosen?

LIST OF PARTIES

The parties to the proceedings below were the petitioners before this Court, Edward W. Murray, Director of the Virginia Department of Corrections, Gerald L. Baliles, Governor of the Commonwealth of Virginia, Robert N. Baldwin, Executive Secretary of the Supreme Court of Virginia, and Michael Samberg, Warden of the Virginia State Penitentiary, and the respondents, Joseph M. Giarratano, Johnny Watkins, Jr. and Richard T. Boggs, inmates confined in the Virginia Department of Corrections under sentence of death. Mr. Watkins and Mr. Boggs are named representatives of a class of death row inmates.

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CONSTITUTIONAL PROVISIONS

The right of "meaningful access to the courts" is not expressly articulated in the Constitution. The following constitutional provisions, however, have been identified as providing the basis for the right:

The First Amendment to the United States Constitution provides in pertinent part, "Congress shall make no law... abridging...the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense."

The Fourteenth Amendment states in pertinent part, "... nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS

§ 14.1-183 Code of Virginia. Persons allowed services without fees or costs. — Any person, who is a resident of this Commonwealth, who, on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefor, except what may be included in the costs recovered from the opposite party.

§ 53.1-40 Code of Virginia. Appointment of counsel for indigent prisoners. — The judge of a circuit court in whose county or city a state correctional facility is located shall, on motion of the Commonwealth's attorney for such county or city, when he is requested so to do by the superintendent or warden of a state

correctional facility, appoint one or more discreet and competent attorneys-at-law to counsel and assist indigent prisoners therein confined regarding any legal matter relating to their incarceration.

An attorney so appointed shall be paid as directed by the court from the criminal fund reasonable compensation on an hourly basis and necessary expenses based upon monthly reports to be furnished the court by him.

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PETITION FOR A WRIT OF CERTIORARI
TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The petitioners, Edward W. Murray, Gerald L. Baliles, Robert N. Baldwin, and Michael Samberg, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceedings on June 3, 1988.

OPINIONS BELOW

The Opinion of the *en banc* Court of Appeals for the Fourth Circuit is reported at 847 F.2d 1118, and is reprinted in the appendix. (App. A-1).

The memorandum opinion of the United States District Court for the Eastern District of Virginia is reported at 668 F.Supp. 511, and is reprinted in the appendix. (App. A-23).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 3, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Joseph M. Giarratano, a Virginia prisoner under sentence of death, initiated this civil rights action pursuant to 42 U.S.C. § 1983, by a *pro se* complaint filed in the district court on July 3, 1985. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343. By Order of May 29, 1986, the district court certified a class consisting of indigent inmates whose death sentences have been upheld on direct appeal and who do not have and cannot afford to hire attorneys to represent them in state habeas corpus proceedings. At the time of trial, thirty-two inmates were confined in Virginia under sentence of death. Only one inmate did not then have counsel.

The inmate plaintiffs asserted a constitutional entitlement to representation by counsel in state and federal post-conviction challenges to their convictions and death sentences. They based the asserted right on the Equal Protection and Due Process provisions of the Fourteenth Amendment, the Sixth Amendment, the Eighth Amendment, Article I, and the right of access to the courts.

The case was tried before the district court on July 10 and 11, 1986. By Order and Opinion of December 18, 1986, the district court determined that the inmates were entitled to individual attorneys to represent them in the preparation, filing, and prosecution of state habeas corpus actions to assure the right of meaningful access to the courts as expressed in *Bounds v. Smith*, 430 U.S. 817 (1977).

Counsel is provided for all indigent defendants accused and convicted of capital crimes in Virginia at trial and on the mandatory direct appeal to the Virginia Supreme Court. Va. Code §§ 19.2-159, 19.2-326. Presently, Virginia law does not require the appointment of counsel to represent inmates in the initiation of collateral attacks on state court judgments. As a matter of state practice, the Virginia Supreme Court has ruled that counsel must be appointed to represent a habeas corpus petitioner who presents non-frivolous claims requiring a hearing. *Darnell v. Peyton*,

208 Va. 675, 160 S.E.2d 749 (1968).

Since the enactment of the present Virginia capital punishment statutes in 1977, death row inmates have relied primarily on volunteer attorneys for assistance in their post-conviction efforts to challenge their convictions and sentences. On two occasions Virginia courts have been asked to appoint counsel for an unrepresented death row inmate to assist the inmate in the prosecution of a habeas corpus action. In both cases the courts appointed counsel. (Plaintiffs' Exhibit 34, Defendants' Exhibit 17). All death row inmates in Virginia have had the assistance of an attorney, whether volunteer or court-appointed, in pursuing state habeas corpus remedies.

Virginia prisoners have access to legal information and assistance from three sources provided by the state. Each of the three institutions housing inmates under sentence of death maintains a law library in substantial compliance with that suggested in *Bounds v. Smith*, 430 U.S. at 819 n.4. (Defendants' Exhibits 4, 9, 12). Additionally, pursuant to Va. Code § 53.1-40, attorneys have been appointed for each institution to "counsel and assist indigent prisoners therein confined regarding any legal matter relating to their incarceration." (Plaintiffs' Exhibits 12, 13; Defendants' Exhibit 6). The institutional attorneys are available to assist the inmate in the preparation of habeas corpus petitions by obtaining the records concerning the trial, including the trial transcript, appellate briefs, and orders; reviewing circumstances of the trial and other proceedings with the inmate to help identify and develop claims; providing the inmate with copies of legal materials, or conducting legal research for the prisoner; and drafting petitions for the inmate to review and file *pro se*. (Tr. pp. 299-302, 329-330).

Virginia trial level courts also have the authority to appoint counsel to represent any indigent inmate in a habeas corpus proceeding. Va. Code § 14.1-183. Such appointments are discretionary with the court and can be made, upon request, prior to the filing of any petition. Attorneys so appointed are compensated by the state for their efforts. As stated above, Virginia's death row inmates not already represented by volunteer or retained lawyers have sought appointment of counsel on only two occasions. On both occasions, the request for appointed counsel was granted.

The district court ruled that meaningful access to the courts

for these inmates could only be provided by "the continuous services of an attorney to investigate, research and present claimed violations of fundamental rights." 668 F.Supp. at 514. The district court concluded that the pool of attorneys willing to volunteer to represent death row inmates in collateral attacks on their death sentences was insufficient to meet the needs of these inmates. The state defendants were ordered to "develop a system whereby attorneys may be appointed to the death row inmates individually." 668 F.Supp. at 517. The injunctive relief ordered was limited to *state* post-conviction proceedings.

The defendants appealed to the United States Court of Appeals for the Fourth Circuit, and the plaintiffs cross-appealed. A split panel of the Fourth Circuit reversed the district court's judgment that the state was constitutionally required to provide attorneys to represent death row inmates in state collateral proceedings. On rehearing *en banc,* however, the district court's judgment was affirmed by a 6-4 vote. The *en banc* decision, like that of the district court, limited the relief to *state* habeas corpus proceedings. 847 F.2d at 1122.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit has created a new right to counsel where none is provided by the Constitution. In the name of "meaningful access to the courts," Virginia is now to be required to provide personal attorneys to represent inmates under sentence of death in the preparation and prosecution of state court collateral attacks on state criminal judgments. In reaching this result, the Fourth Circuit majority disregarded and effectively overturned applicable decisions of this Court that reject a constitutional right to post-conviction counsel, preclude a constitutionally preferred status for death row inmates in collateral proceedings, and limit the obligation on the states to provide legal assistance to inmates. Not only does it conflict with decisions of this Court, but the decision of the Fourth Circuit majority adopts an interpretation of the right of access to the courts in conflict with that articulated by every other federal circuit.

By creating a rule of special application to death-sentenced inmates, the Fourth Circuit majority has substituted its judgment of what it considers to be a desirable policy in state post-conviction proceedings for what is constitutionally required, and

has thereby preempted a legislative prerogative of the state. These circumstances demonstrate the exceptional importance of this case and the need for this Court to exercise its authority to review the judgment below.

A. THE FOURTH CIRCUIT'S UNWARRANTED EXPANSION OF *BOUNDS v. SMITH* DISREGARDS THIS COURT'S STATEMENT OF THE LIMITED OBLIGATIONS ON THE STATES UNDER THE RIGHT OF ACCESS TO THE COURTS AND CONFLICTS WITH THE INTERPRETATION OF THAT RIGHT ADOPTED BY EVERY OTHER FEDERAL CIRCUIT.

Eleven years ago, in *Bounds v. Smith,* 430 U.S. 817 (1977), this Court declared that state prisoners have a constitutional right of meaningful access to the courts. The Court specifically held that states are obligated to "assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. at 828.

Bounds did not suggest that the states' obligation to provide legal assistance to inmates included providing a personal lawyer to represent each inmate. The appointment of counsel to represent inmates was mentioned only as an independent issue, and, by reference to *Ross v. Moffitt,* 417 U.S. 600 (1974), and *Johnson v. Avery,* 393 U.S. 483 (1969), the Court underscored the conclusion that there is *no* obligation on state and federal courts to appoint counsel for inmates who indicate an intention to seek post-conviction relief. 430 U.S. at 820-21, 826 n.15.

Rather, the right of "meaningful access to the courts" imposes a limited obligation on the states to make some source of legal assistance available to provide inmates a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights." 430 U.S. at 825; *see Procunier v. Martinez,* 416 U.S. 396, 419 (1974) ("reasonable opportunity to seek and receive assistance"); *Ross v. Moffitt,* 417 U.S. at 616 ("adequate opportunity to present claims fairly"); *Wolff v. McDonnell,* 418 U.S. 539, 576 (1974) ("opportunity to present"). The states clearly are not required to provide the optimal assistance conceivable. In articulating the right of access, this Court recog-

nized that the limitations of some prisoners might impair their ability to make the best use of the legal services provided, and acknowledged that a lawyer could prepare and file legal pleadings more efficiently and effectively than a layman. 430 U.S. at 825-26, 831, 841. The Court, however, specifically rejected the argument that law libraries were inadequate to provide meaningful access for inmates "ill-equipped to use" such facilities. 430 U.S. at 826.

This Court has not addressed the scope of the right of meaningful access to the courts since *Bounds*. The extension of that right by the Fourth Circuit majority to include a right to personal counsel, however, cannot be reconciled with this Court's statement of the limited nature of the states' obligation.

Before the decision in this case, all federal courts of appeals interpreted the holding of *Bounds* as defining the limits of the states' obligation: the states have been required to provide either law libraries or some form of assistance from persons trained in the law. *Carter v. Fair*, 786 F.2d 433, 435 (1st Cir. 1986); *Spates v. Manson*, 644 F.2d 80 (2d Cir. 1981); *Valentine v. Beyer*, 850 F.2d 951 (3d Cir. 1988); *Almond v. Davis*, 639 F.2d 1086 (4th Cir. 1981); *Mann v. Smith*, 796 F.2d 79 (5th Cir. 1986); *Penland v. Warren County Jail*, 759 F.2d 524 (6th Cir. 1985) (*en banc*); *Corgain v. Miller*, 708 F.2d 1241 (7th Cir. 1983); *Kelsey v. State of Minnesota*, 622 F.2d 956, 958 (8th Cir. 1980); *Lindquist v. Idaho State Board of Corrections*, 776 F.2d 851 (9th Cir. 1985); *Nordgren v. Milliken*, 762 F.2d 851, 854 (10th Cir.), *cert. denied*, 474 U.S. 1032 (1985); *Hooks v. Wainwright*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 107 S.Ct. 313 (1986).

Until this case, the right of meaningful access to the courts has not been interpreted as requiring a right to counsel. *See, e.g., Mann v. Smith*, 796 F.2d at 84 (*Bounds* cannot have meant to require legal assistance equivalent to the provision of a lawyer); *Carter v. Fair*, 786 F.2d at 433 (comprehensive legal representation not required); *Corgain v. Miller*, 708 F.2d at 1250 (actual attorney-client relationship not required; advice is sufficient).

What has been deemed settled law, however, has now become uncertain territory. In this case, the Fourth Circuit majority rejected a state system that included *both* forms of legal assistance specifically held by this Court in *Bounds* to satisfy the state's obligation under the right of access. The majority adopted an interpretation of the right of access that expands that right

and the corresponding obligation on the state far beyond this Court's decision in *Bounds*. The expansive reading of this right by the Fourth Circuit majority conflicts with the limited interpretations adopted by *every* other circuit. The need for uniform application of this constitutional right strongly argues in favor of this Court granting certiorari in this case.

B. THE FOURTH CIRCUIT MAJORITY HAS CREATED A RIGHT TO POST-CONVICTION COUNSEL IN DISREGARD OF THE RECENT DECISION OF THIS COURT IN *PENNSYLVANIA v. FINLEY*.

In *Pennsylvania v. Finley*, 107 S.Ct. 1990 (1987), this Court ruled that there is no constitutional right to counsel for state post-conviction attacks on state convictions. Dissenting below, Judge Wilkins noted: "We are concerned here with the identical type of proceeding addressed in *Finley*, state habeas corpus, on the heels of a clear and recent statement by the Supreme Court that there is no previously established right to counsel in state habeas corpus proceedings." 847 F.2d at 1127. The Fourth Circuit majority, however, concluded that the state's reliance on *Finley* was "misplaced." 847 F.2d at 1121.

Finley presented the issue of whether procedures articulated in *Anders v. California*, 386 U.S. 738 (1967), for attorneys seeking to withdraw from frivolous appeals, were constitutionally mandated in state post-conviction proceedings. Resolution of that issue required a determination of the constitutional basis for providing counsel in such proceedings:

> *Anders* established a prophylactic framework that is relevant when, and only when, a litigant has a previously established constitutional right to counsel.
> We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks to their convictions, and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.

107 S.Ct. at 1993 (citation omitted).

The Court canvassed the possible constitutional grounds upon which a right to post-conviction counsel could be predicated, *including the right of "meaningful access,"* and concluded

that the Constitution does not obligate the states to provide attorneys in a post-conviction proceeding. 107 S.Ct. at 1994. State court collateral attack is even further removed from the trial than direct appeal. It is not a criminal proceeding; it is civil in nature. In *Ross v. Moffitt*, the Court held that a litigant is not denied "meaningful access to the courts" because the state does not provide an attorney to assist in discretionary appellate review of a conviction. 417 U.S. at 614-15. In *Finley*, the Court stated: "We think the same conclusion necessarily obtains with respect to post-conviction review." 107 S.Ct. at 1994.

The decision of the Fourth Circuit majority is "impossible to square" with this Court's unambiguous statement that no right to counsel for state post-conviction review is mandated by the Constitution. 847 F.2d at 1123 (Wilkinson, J., dissenting and concurring). In light of *Finley's* clear teaching, this Court should exercise its certiorari power to review, if not summarily reverse, the decision below which has manufactured a "right" to counsel where no such right exists.

C. THE FOURTH CIRCUIT'S ESTABLISHMENT OF A PREFERRED STATUS FOR DEATH ROW INMATES CREATES AN IRRECONCILABLE CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Constitution does not require that the states provide post-conviction review of criminal judgments. *Finley*, 107 S.Ct. at 1994. While habeas corpus proceedings play an important role in the review of criminal judgments, that role is secondary and limited. As this Court has specifically ruled, direct appeal is the primary avenue for review of a conviction and sentence, and *"death penalty cases are no exception."* *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983) (emphasis added).

The Fourth Circuit majority sought to distinguish *Finley* because it did not involve a death sentence. Citing the "significant constitutional difference between the death penalty and lesser punishments," the majority asserted that the unique nature of the penalty requires the appointment of counsel for state post-conviction challenges. 847 F.2d at 1122. By creating a special exception for death cases, however, the Fourth Circuit

majority only heightened its conflict with decisions of this Court. Nothing in this Court's decisions in capital cases recognizes a special status for habeas corpus petitioners challenging death sentences.

There is no presumption that a death sentence is inherently suspect. Additional procedural protections required for capital trials and sentencing are designed to assure a reliable and accurate determination that death is the appropriate penalty in a particular case. Such procedures are not applicable in the context of a post-conviction proceeding. *See Ford v. Wainwright*, 477 U.S. 399, 425 (1986) (Powell, J., concurring). A death sentence is a constitutionally permissible punishment, entitled to the same presumption of finality and legality after the process of direct review as any other sentence.

Neither the qualitative difference of the death penalty, nor any constitutional provision, requires preferred procedures for persons challenging death sentences in collateral proceedings. *See Smith v. Murray*, 477 U.S. 527, 538 (1986) (no *per se* exception to application of procedural default bar for capital cases); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (no different standard for ineffective assistance of counsel claims for death cases); *Barefoot v. Estelle*, 463 U.S. at 893 (no automatic certificate of probable cause for death cases).

The Fourth Circuit majority created an exceptional application of the right of meaningful access to the courts for death row inmates because of the supposed complexity and difficulty of the legal work involved in challenging a death penalty. The majority thus adopted a *per se* rule that a law library and the assistance of an institutional attorney are inadequate for these inmates. There is no basis, however, for an across-the-board assumption that all cases involving a death sentence are so inherently complex that no death row inmate can present his claims without a personal attorney to represent him. Nor can it be presumed that an inmate convicted of a non-capital offense is confronted with intrinsically less difficult or complex issues. The sweeping generalization that death row inmates require representation by individual counsel to ensure access to the courts creates an entirely artificial and arbitrary delineation of rights, certain to provoke further attempts to expand a right to post-conviction counsel.

Virginia's choice of means to provide legal assistance was rejected by the courts below for reasons supposedly peculiar to

death row inmates. Both the Fourth Circuit majority and the district court concluded that providing a law library did not satisfy the state's obligation under *Bounds*.[1] The availabiiity of institutional attorneys was deemed insufficient because of the scope of such assistance.[2] Both the district court and the Fourth Circuit majority relied on the erroneous conclusion that appointment of counsel to represent inmates was available under state law only after a petition raising non-frivolous claims was filed.[3]

The Virginia system was not rejected by the lower courts based on any demonstrated failure of Virginia to provide legal assistance as mandated by *Bounds*. Death row inmates in Virginia have relied almost exclusively on an alternative system of privately recruited volunteer attorneys, and have not used the assistance presently available.[4] Based upon fears that their efforts to obtain sufficient volunteers in the future will fail, they have sought to impose upon the Commonwealth, by federal court injunction, the obligation of providing legal assistance in the form that they prefer. The lower courts have acceded to the inmates wishes in this regard, and have added their opinion as to what form of legal assistance is most desirable in state post-conviction proceedings. That policy matter, however, is one properly committed to the judgment of the states. *Finley*, 107 S.Ct. at 1995.

The Fourth Circuit majority's decision is not limited in its application by facts peculiar to Virginia's laws and procedures or

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[1] The district court found that death row inmates are incapable of effectively using law books because of the limited amount of time death row inmates had to prepare and present their petitions; the complexity and difficulty of the legal work; and the emotional instability of inmates preparing themselves for impending death. 668 F.Supp. at 513.

[2] They do not perform exhaustive factual inquiries, sign pleadings or appear in court on behalf of the inmates; they act as legal advisors -- not counsel of record. 668 F.Supp. at 514.

[3] The Virginia statute authorizing the appointment of counsel, § 14.1-183, and state court decisions, *see Darnell v. Peyton*, 208 Va. 675, 160 S.E.2d 749 (1968), do not contain such a limitation. The record affirmatively shows that state courts have appointed counsel prior to the filing of any petition. (Defendant's Exhibit 17).

[4] The defendants have consistently asserted the lack of a case or controversy because of the inmates' failure to use the forms of assistance already available in Virginia. The Fourth Circuit majority did not address the issue. In a separate concurring and dissenting opinion, Judge Widener noted the plaintiffs' lack of standing to pursue this case because they have always had counsel. 847 F.2d at 1122.

by the nature of Virginia's death row inmates. The decision is, by its very terms, applicable to any case involving a death-sentenced inmate:

> Because of the peculiar nature of the death penalty, we find it difficult to envision any situation in which appointed counsel would not be required in state post-conviction proceedings when a prisoner under the sentence of death could not afford an attorney.

847 F.2d at 1122 n. 8.

The court below has thus created a new right to counsel without any constitutional basis, justified only by reasons that lack constitutional significance. By establishing a constitutionally preferred status for death row inmates, the Fourth Circuit majority has ignored applicable decisions of this Court that reject such a status. This decision is certain to cause confusion among the other circuits, and warrants this Court's exercise of its certiorari power.

D. THE CONSEQUENCES OF A RIGHT TO COUNSEL FOR DEATH-SENTENCED INMATES IN STATE COLLATERAL CHALLENGES TO THEIR CONVICTIONS UNDERSCORE THE SPECIAL IMPORTANCE OF THIS CASE.

This Court is particularly aware of the confusion and delay that is now the hallmark of capital post-conviction litigation. The administration of capital punishment is already subject to a process of multiple layers of review of state court criminal convictions that consumes the time and resources of the litigants and the courts. The decision of the Fourth Circuit majority will certainly produce even additional layers of litigation that will further frustrate the efforts of the states to enforce their criminal laws.

The mischief of this newly created constitutional "right" cannot be ignored. If the decision below is permitted to stand, the attorney who unsuccessfully represents a death row inmate in a post-conviction proceeding, like the attorney who defended the inmate at trial, will become the focus of a new round of post-conviction challenge. This Court has recognized that the right to counsel, if constitutionally mandated, carries with it the right to effective counsel. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985);

Strickland v. Washington, 466 U.S. 668, 686 (1984); *cf. Pennsylvania v. Finley*, 107 S.Ct. at 1994.; *Wainwright v. Torna*, 455 U.S. 586, 588 n.4 (1982). In an area of the law already marked by protracted and repetitive litigation, the Fourth Circuit majority's ruling injects a palpable danger of infinite delay:

> Although the new right to post-conviction counsel does not appear to arise from the Sixth Amendment, it will presumably carry with it some entitlement to 'effective assistance.' Provision of counsel on constitutional grounds also brings with it a panoply of procedural requirements.... It is hard to imagine a more fertile ground for litigation than that provided by these entitlements. *The likely result will be additional cycles of prisoner litigation in every capital case, each ever further removed from the proper focus of criminal adjudication — the trial itself.*

847 F.2d at 1125 (emphasis added) (Wilkinson, J., dissenting and concurring). The creation of a federal constitutional right to counsel for death row inmates in state post-conviction proceedings will no doubt provoke a potentially endless succession of collateral proceedings in which the petitioner invokes a right to counsel to challenge the effectiveness of the next previous attorney.[5] "The result is akin to the effect created when a mirror is held facing another mirror, the image repeating itself to infinity." *Evitts v. Lucey*, 469 U.S. at 411 (Rehnquist, J., dissenting).

Significantly, the Fourth Circuit majority and the district court have created an entitlement to a personal lawyer for death row inmates in state court collateral proceedings, but have not granted such a right for federal habeas corpus actions involving the same inmates challenging the same convictions and sentences. Thus, the lower courts in this case have been willing to thrust upon the Commonwealth of Virginia a system which they are unwilling or unable to force upon the federal government. The remarkable result is that the Federal Constitution is deemed to require greater protection for a state inmate in state court than for the same inmate in federal court.

[5] At least one Virginia death row inmate has already raised a claim of ineffective assistance of state habeas counsel as the basis for a successive federal habeas corpus petition. In a decision issued before the present case was argued, the Fourth Circuit rejected the prisoner's claim. *Whitley v. Muncy*, 823 F.2d 55 (4th Cir. 1987).

This federal intrusion into a matter peculiarly committed to the states' authority — state post-conviction review of a state criminal judgment — "disregards the independence of state judicial systems and the respective spheres of legislative and judicial competence." 847 F.2d at 1123. (Wilkinson, J., dissenting and concurring). This Court has repeatedly stressed the interests of the state in the enforcement of its criminal laws in the context of federal habeas corpus review of state court criminal convictions. The exhaustion requirement of the federal habeas corpus statute, *see* 28 U.S.C. § 2254(b) and (c), the deference to state court factual findings, *see* 28 U.S.C. § 2254(d), and the enforcement of state court procedural rules, *see Wainwright v. Sykes*, 433 U.S. 72 (1977), all reflect a respect in our federal system for the state's interest in its criminal judgments. That interest is certainly paramount to any federal interest which has been identified in this case.[6] The effect of this intrusion, as Judge Wilkinson noted in dissent below, is that "[s]tate post-conviction remedies will now move one step closer to the status of a federal protectorate." 847 F.2d at 1125.

This Court, however, has already rejected the premise that the Federal Constitution dictates the precise form that state post-conviction proceedings should assume. "On the contrary, in this area the States have substantial discretion to develop and implement programs to aid prisoners seeking to secure post-conviction review." *Finley*, 107 S.Ct. at 1995.

Thirty-seven states and the federal government provide for application of the death penalty as a permissible punishment for the most serious crimes. At trial in this case, plaintiffs estimated that two-thirds of the states with capital punishment statutes do not provide lawyers as a matter of right for inmates seeking relief from their sentences in state post-conviction actions. Of the remaining states, a variety of means has been chosen to provide counsel to death row inmates as a matter of state law or practice, ranging from Florida's Office of Capital Collateral Representative, Fla. Stat. Ann. §§ 27.7001 et seq. (West 1988), to state statutes and court rules allowing the appointment of counsel in

[6] The effect of the intrusion of the federal judiciary into state proceedings is further magnified by the relief ordered in this case. The injunctive relief ordered guarantees the continuing supervision of post-conviction proceedings by the district court and the invocation by the inmates of the contempt power of the federal court to challenge the adequacy of the state system.

state post-conviction proceedings. *See, e.g.*, Ariz. Rev. Stat. Ann., Rules of Crim. Proc., Rule 32.5(b); Colo. Rev. Stat. § 21-1-104 (1986); Ill. Rev. Stat. ch.38, § 122-4 (1988); Miss. Code Ann. § 99-39-23 (1987). If the decision below requiring the automatic provision of personal counsel to represent death row inmates in state post-conviction proceedings is permitted to stand, all states which administer a system of capital punishment must expect challenges to their post-conviction procedures on the basis of this newly-found constitutional right to counsel.

The decision of the court below ignores the consequences of the "right" that has been created. The interests of comity and finality that this Court has stressed as primary considerations when the federal judiciary reviews state court criminal judgments and the interests of the state in determining for itself what means of access to provide have been subordinated to the Fourth Circuit majority's notion of how state habeas corpus actions should proceed. This significant and unjustified intrusion into the conduct of state proceedings raises an issue of importance to all states that must be resolved by this Court.

CONCLUSION

The question presented here is clearly one of exceptional importance. The expansion of the right of access to the courts to include a new right to counsel for death-sentenced inmates in state collateral attacks represents a radical departure from existing law and an unprecedented intrusion by a federal court into matters peculiarly the responsibility and concern of the states. In the process, the decision below raises doubts about the interpretation of the right of access to the courts presently adopted by all federal circuits, and is certain to cause confusion in the states' good faith efforts to meet their obligations under *Bounds v. Smith*.

By creating a special and preferred status for death row inmates in state habeas corpus proceedings, the courts below have institutionalized the misguided concept that a death sentence entitles an inmate to more opportunities to litigate and relitigate issues that are ever further removed from the proper focus of such litigation — the trial. The ironic result is that those who have committed the most reprehensible offenses against our society are granted the greatest protection from punishment, and

the ultimate punishment for the ultimate offenses will be delayed so long as to be rendered meaningless. That such a result has been obtained in this case through judicial fiat rather than legislative choice demonstrates the need for review by this Court.

Respectfully submitted,

MARY SUE TERRY
Attorney General of Virginia

H. LANE KNEEDLER
Chief Deputy Attorney General

STEPHEN D. ROSENTHAL
Deputy Attorney General

* ROBERT Q. HARRIS
Assistant Attorney General

RICHARD F. GORMAN, III
Assistant Attorney General

Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

* *Counsel of Record*

August 1988

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-7518

JOSEPH M. GIARRATANO; JOHNNY
WATKINS, JR.; RICHARD T. BOGGS

Plaintiffs - Appellees

versus

EDWARD W. MURRAY, Director,
Virginia Department of Corrections;
GERALD L. BALILES, Governor;
ROBERT N. BALDWIN;
MICHAEL SAMBERG,
Warden, in their official capacities;

Defendants - Appellants

AMERICAN BAR ASSOCIATION

Amicus Curiae

No. 87-7519

JOSEPH M. GIARRATANO; JOHNNY
WATKINS, JR.; RICHARD T. BOGGS

Plaintiffs - Appellants

versus

EDWARD W. MURRAY, Director,
Virginia Department of Corrections;
GERALD L. BALILES, Governor;
ROBERT N. BALDWIN;
MICHAEL SAMBERG,
Warden, in their official capacities;

Defendants - Appellees

AMERICAN BAR ASSOCIATION

Amicus Curiae

Appeals from the United States District Court for the Eastern District of Virginia, at Richmoad. Robert R. Merhige, Jr., Senior District Judge. (CA-85-655-R)

Argued: April 6, 1988 Decided: June 3, 1988

Before WINTER, Chief Judge, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, CHAPMAN, WILKINSON, and WILKINS, Circuit Judges.

Robert Q. Harris, Assistant Attorney General (Mary Sue Terry, Attorney General; Richard F. Gorman, III, Assistant Attorney General; Guy W. Horsley, Jr., Senior Assistant Attorney General on brief) for Appellants. Steven E. Landers (Jay Topkis, Alisa D. Shudofsky, Clyde Allison, PAUL, WEISS, RIFKIND, WHARTON & GARRISON; Gerald T. Zerkin, ZERKIN, HEARD & KOZAK; Martha A. Geer, SMITH, PATTERSON, FOLLIN, CURTIS, JAMES & HARKAVY; Jonathan D. Sasser, MOORE & VAN ALLEN on brief) for Appellees. (Eugene C. Thomas, Ronald J. Tabak, Sara-Ann Determan, Charles G. Cole, AMERICAN BAR ASSOCIATION on brief) for Amicus Curiae.

HALL, Circuit Judge:

This is a consolidated appeal and cross-appeal arising from a class action initiated by death row inmates in the State of Virginia pursuant to 42 U.S.C. § 1983. The State appeals an order of the district court requiring the appointment of counsel for inmates challenging their death penalty through state habeas proceedings. The inmate class cross-appeals the district court's refusal to order the appointment of counsel in federal post-conviction proceedings. By a majority vote, a panel of this Court reversed that portion of the judgment of the district court requiring appointment of counsel for death row inmates in state proceedings. *Giarratano, et al. v. Murray, et al.*, 836 F.2d 1421 (4th Cir. 1988). Thereafter, a majority of the Court voted to reconsider the case *en banc*. A majority of the *en banc* Court has now voted to affirm the judgment of the district court for the reasons set forth below.

I.

Virginia currently provides three forms of legal assistance to death row inmates pursuing post-conviction claims —law libraries, unit attorneys, and appointed attorneys. Death row inmates are housed at Mecklenberg Correctional Center, the Virginia State Penitentiary and the Powhatan Correctional Center. Each of these three centers maintain law libraries. Mecklenberg death row inmates are permitted two half-day periods weekly; death row inmates at Powhatan and the Penitentiary are not permitted to visit the libraries, but may borrow materials for use in their cells.

Unit attorneys are assigned to the various penal institutions to assist inmates in any matter related to incarceration. In addition to these unit attorneys, Virginia provides for the appointment of counsel, under certain circumstances, to indigent inmates who have been residents of Virginia for six months.[1] Va. Code § 14.1-183 (1950). Under this provision the courts in Virgi-

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[1] Va. Code § 14.1-183 was amended in 1987 to delete the six-month residency requirement. (Repl. Vol. 1985 & Supp. 1987). However, this change in the Code does not alter our disposition of this appeal.

nia have the discretion to appoint counsel to represent inmates proceeding *in forma pauperis*. Death row inmates in Virginia, seeking collateral relief from their sentences through state post-conviction remedies, have traditionally had no automatic right to the assistance of counsel.

This action was originally brought by Joseph M. Giarratano, a Virginia death row inmate, who sought declaratory and injunctive relief with respect to post-conviction assistance of counsel. The district court permitted other death row inmates to intervene in the suit and granted their motion for class certification. The class consists of:

> all persons, now and in the future, sentenced to death in Virginia, whose sentences have been or are subsequently affirmed by the Virginia Supreme Court and who either (1) cannot afford to retain and do not have attorneys to represent them in connection with their post-conviction proceedings, or (2) could not afford to retain and did not have attorneys to represent them in connection with a particular post-conviction proceeding.

The death row inmates had presented a number of constitutional grounds in support of their claim of right to post-conviction assistance of counsel.[2] However, the district court granted relief only on the basis of the right of access to the courts as stated in *Bounds v. Smith*, 430 U.S. 817 (1977). In *Bounds*, the Supreme Court held that prison authorities are required to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or assistance from legally trained personnel.

The district court found, based upon evidence presented at the trial, that the death row inmates were incapable of effectively using law books to raise their post-conviction claims. Three considerations led the district court to this conclusion:

> (1) the limited amount of time death row inmates had to prepare and present their petitions to the courts;
> (2) the complexity and difficulty of the legal work; and
> (3) the emotional instability of inmates preparing themselves for impending death.

The district court consequently found that the provision of a library did little to satisfy Virginia's obligation to assist death row inmates in the preparation and filing of meaningful legal papers as required by *Bounds*. The district court then turned to the examination of the assistance presently provided by Virginia to determine if it met the constitutional requirement.

[2] These grounds included the sixth amendment, eighth amendment, fourteenth amendment due process clause, Article I, the equal protection clause, and the right of access to the courts.

The district court found that the assistance provided by unit attorneys was inadequate both in fact and in law. Evidence produced at trial indicated that seven institutional attorneys were attempting to meet the needs of over 2,000 prisoners and that each attorney could not adequately handle more than one capital case at a time. In addition, the unit attorneys were not hired to work full time. The district court also noted that even if Virginia appointed unit attorneys to service only the death row inmates, its duty under *Bounds* would not be fulfilled because the scope of assistance was too limited.[3] The district court concluded that only the continuous services of an attorney to investigate, research, and present claimed violations of fundamental rights could provide death row inmates the meaningful access to the courts guaranteed by the Constitution and that the assistance of unit attorneys fell short of this requirement.

The district court then turned to the second form of legal assistance, provided by appointed attorneys, and found that the timing of the appointment was a fatal defect with respect to the requirements of *Bounds*. Appointments are made under Va. Code § 14.1-183 only after a petition is filed and then only if a non-frivolous claim is raised. Thus, the district court reasoned, the inmate would not receive the attorney's assistance in the critical stages of developing his claims.[4] The district court concluded that in view of the inadequacy of the assistance provided by Virginia and the scarcity of competent and willing counsel to assist indigent death row inmates seeking post-conviction remedies,[5] such relief was necessary and warranted.[6] In order to

[3] The evidence indicated that the unit attorneys do not perform factual inquiries, sign pleadings, or make court appearances. Instead, they act only as legal advisors.

[4] This assistance is particularly critical in Virginia where all claims, the facts of which are known at the time of filing, must be included in that petition as they may not be raised successfully in a subsequent filing and those claims also could not be considered in federal court because federal courts generally may not consider claims barred by Virginia procedural rules. *Whitley v. Bair*, 802 F.2d 1487 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 1618 (1987), and *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661 (1986).

[5] The district court found that in the past Virginia had perceived no need to provide counsel to death row inmates pursuing post-conviction relief because attorneys volunteered their services or were recruited to provide pro bono assistance to death row prisoners. However, the evidence presented at trial established that few attorneys are now willing to voluntarily represent death row inmates in post conviction efforts.

[6] *(See next page.)*

provide effective relief, the district court held that Virginia must provide death row inmates trained legal assistance in their state post-conviction proceedings.

II.

On appeal, the State contends that the constitutional right of access to the courts does not require appointment of counsel for death row inmates in state habeas corpus proceedings and that Virginia provides constitutionally adequate legal assistance to death row inmates. Alternatively, the State argues that the Supreme Court has determined in *Pennsylvania v. Finley*, ___ U.S. ___, 107 S.Ct. 1990 (1987), that there is no constitutional right to counsel in state post-conviction proceedings. On cross-appeal, the death row inmates contend that the district court's reading of *Bounds* limiting its application to state post-conviction proceedings, does not adhere to the current state of the law. We disagree with all of these contentions and address them seriatim.

We are persuaded by the well reasoned opinion of the district court that legal assistance presently available to Virginia death row inmates in state post-conviction proceedings fails to meet the constitutional requirement of meaningful access to the courts as set forth in *Bounds*. It is now established beyond a doubt that prisoners have a constitutional right of access to the courts. The district court evaluated the existing Virginia program "as a whole to ascertain its compliance with constitutional standards." *Bounds*, 430 U.S. at 832. The district court made

[6] The district court's order specifically provided that:

> (1) indigent Virginia death row inmates are entitled to the appointment of counsel upon request to assist them in pursuing habeas corpus relief in the state courts;
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> (2) defendants shall develop a system whereby attorneys may be appointed to the death row inmates individually as provided above;
>
> (3) plaintiffs are entitled to their taxable costs and attorney fees as provided by law; and
>
> (4) counsel for the parties shall attempt to reach an agreement as to counsel fees. Any such agreement shall be without prejudice to defendants' right to contest the right of plaintiffs to recover same.

findings of fact based upon the record which indicated that Virginia was not in compliance with constitutional rights of access to the courts. Under *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), we cannot say these findings of fact are clearly erroneous. Nor do we find that the district court abused its discretion in formulating the remedy in this case. *Milliken v. Bradley, (Milliken II)*, 433 U.S. 267 (1977).

The State's reliance on *Pennsylvania v. Finley, supra*, as authority for their contention that state prisoners are not constitutionally entitled to state-supplied attorneys in post-conviction proceedings is misplaced. In *Finley*, the Supreme Court held that the procedural framework of *Anders v. California*, 386 U.S. 738 (1967), does not apply to the situation in which counsel appointed pursuant to Pennsylvania state law later seeks to withdraw from the representation without first filing a brief. The Court stated that because Pennsylvania was not constitutionally required to provide counsel in post-conviction proceedings, then due process did not require that the counsel's actions comport with the *Anders* procedures.[7] However, *Finley* was not a meaningful access case, nor did it address the rule enunciated in *Bounds v. Smith*. Most significantly, *Finley* did not involve the death penalty.

Both society and affected individuals have a compelling interest in insuring that death sentences have been constitutionally imposed. Moreover, the complexity and difficulty of the legal work involved in challenging a death penalty require particular safeguards in order to insure meaningful access. The Supreme Court has stated that "there is a significant constitutional difference between the death penalty and lesser punishments." *Beck v. Alabama*, 447 U.S. 625, 637 (1980). In addition, the Supreme Court recently held that matters affecting an already condemned prisoner call for "no less stringent standards than those demanded in any other aspect of a capital proceeding." *Ford v. Wainwright*, 477 U.S. 399, 411-12 (1986). *See also, Booth v. Maryland*, ___ U.S. ___, 107 S.Ct. 2529 (1987) ("death is a punishment different from all other sanctions.")[8] We do not,

[7] The *Anders* procedures require counsel to perform a conscientious evaluation of the record, to write a brief referring to arguable support in the record and to give notice to the client.

[8] Because of the peculiar nature of the death penalty, we find it difficult to envision any situation in which appointed counsel would not be required in

(Continued on next page)

therefore, read *Finley* as suggesting that the counsel cannot be required under the unique circumstances of post-conviction proceedings involving a challenge to the death penalty.

III.

The death row inmates argue that the district court erred in denying counsel for federal habeas corpus and certiorari petitions. We disagree. In *Ross v. Moffitt*, 417 U.S. 600 (1974), the Supreme Court rejected a claim that states must appoint counsel for indigents seeking a writ of certiorari. The Court also observed that in considering a writ of certiorari it would have available appellate briefs, a transcript and state court opinions. Similarly, a federal court considering a petition for habeas corpus would also have briefs of counsel, a transcript and opinions because of the exhaustion of remedies requirement.

Virginia provides for a mandatory appeal for capital convictions and death sentences and counsel is provided for this appeal. The death row inmates would have available the appellate briefs, transcripts and state court opinions to use in their writs of certiorari. If the inmates are provided with court-appointed attorneys in their state post-conviction proceedings, they will have briefs, transcripts and opinions to use in their federal habeas corpus proceedings. We conclude that the provision of assistance of attorneys at these points insure that the inmates are provided with meaningful access to the federal courts in their federal post-conviction proceedings.

IV.

Accordingly, for all the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

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[8] *(Continued from previous page.)* state post-conviction proceedings when a prisoner under the sentence of death could not afford an attorney.

WIDENER, Circuit Judge, concurring and dissenting:

I concur in Judge Wilkins' separate opinion without reservation, but I would add a few words.

I

I am doubtful indeed that the plaintiffs in this case have standing to prosecute their case. As Judge Wilkins has demonstrated in his dissenting opinion "...the record does clearly establish that all death row inmates have always been represented by counsel in state post-conviction proceedings." The majority opinion does not refute this factual statement.

In *Allen v. Wright*, 468 U.S. 737 (1984), the Court stated that "[t]he requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." 468 U.S. at 751. The Court relied for that proposition on its recent opinion in *Valley Forge College v. Americans United*, 454 U.S. 464 (1982). Because the plaintiffs and their class have always had appointed attorneys upon request, I suggest they have no standing to prosecute this case.

This suggestion, however, does not meet with favor, so I will continue. Cf. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981).

II

I am at a loss to understand the logic of the majority decision which holds that appointed attorneys are not required in federal habeas corpus proceedings which examine the merits of the prisoners' claims but are required in state habeas corpus proceedings which, even if unsuccessful (as must be contemplated in the context present here), go no further than exhaustion of state remedies and fact finding.

III

One cannot but read the majority opinion without the feeling that the Commonwealth considers death row inmates some

kind of second class citizens who get second class service, for, when access to the federal courts is provided, sl. op. p. 11, attorneys are not required, sl. op. p. 10-11, but, when access to the state courts is provided, attorneys are. Only lightly veiled is the inference that neither the courts nor the legislature of Virginia see fit to take proper care of those unfortunates.

An example which refutes this implied charge of insensitivity is Virginia's treatment of those accused of felony. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court established the right under the federal Constitution that one accused of felony, if indigent, has the right to have an attorney represent him in the criminal proceeding. Almost 70 years before, in *Barnes v. Commonwealth*, 23 S.E. 784 (Va. 1895), the Supreme Court of Virginia established that same right under the Virginia Constitution: "Every person convicted of crime has a constitutional right to have counsel to aid him in making his defense, but no one is compelled to have counsel." 23 S.E. at 787. And the Court added that "in the defense of one 'who has the double misfortune to be stricken with poverty and accused of crime. No. . . [attorney] is at liberty to decline such appointment, and few it is hoped would be disposed to do so.'" 23 S.E. at 6787, quoting Cooley on Constitutional Limitations. The *Barnes* decision has been consistently followed in Virginia ever since, and indeed was codified in 1940, more than 20 years before *Gideon*. Virginia Acts of Assembly, 1940, ch. 218.

So, neither the courts nor the legislature of the Commonwealth has been insensitive to the needs of those accused of crime, and other Virginia statutes yet provide for the obligatory appointment of counsel in habeas corpus proceedings where a hearing is to be held, as Judge Wilkins demonstrates in his opinion, but which appointment authority has in fact been honored by the Virginia courts in all cases as the record demonstrates, even when not obliged.

In sum, I do not agree with either the tenor or effect of the majority decision.

WILKINSON, Circuit Judge, concurring in part and dissenting in part:

I join Judge Wilkins' concurring and dissenting opinion. He demonstrates well that the majority's holding is impossible to square with the Supreme Court's decisions in *Pennsylvania v. Finley*, 107 S. Ct. 1990 (1987), and *Ross v. Moffitt*, 417 U.S. 600 (1974). This creation of a right *sans* constitutional basis not only contravenes Supreme Court precedent but also disregards the independence of state judicial systems and the respective spheres of legislative and judicial competence.

The federal interest in the form of state post-conviction review is an attenuated one. It is beyond question that a state has no constitutional obligation to provide post-conviction review. *E.g., Finley*, 107 S. Ct. at 1994. This is so because post-conviction relief is not a part of the criminal trial itself, but a separate civil proceeding. *Id.* The plaintiffs in this case do not seek to have lawyers appointed at state expense in order to defend themselves from state allegations of which they are presumed innocent. Rather, they seek the services of a lawyer as a sword to overturn a prior determination of guilt that is presumed to be valid. *Ross*, 417 U.S. at 610-11.

This analysis applies with equal force in capital cases. "[D]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). Once the direct appeal process is complete, a presumption of legality and finality attaches to the conviction and sentence. *Id.* Although the Constitution requires that the death penalty may be imposed only through procedures that provide the highest degree of reliability, there is no support for the view that death penalty cases are subject to a separate set of standards for post-conviction review. *See, e.g., Smith v. Murray*, 106 S. Ct. 2661, 2668 (1986) (rejecting a separate standard for procedural foreclosure in capital cases).

The limited scope of federal habeas corpus further demonstrates that the federal interest in the form of state post-conviction relief is minimal. The intrusion on state interests that federal habeas entails may be exercised only for a narrow purpose, to challenge unconstitutional confinement. Thus the Courts of Appeals overwhelmingly hold that federal habeas corpus is not available to challenge alleged defects in state post-

conviction proceedings. *See Kirby v. Dutton*, 794 F.2d 245 (6th Cir. 1986); *Vail v. Procunier*, 747 F.2d 277 (5th Cir. 1984); *Mitchell v. Wyrick*, 727 F.2d 773 (8th Cir. 1984). The principle expressed in these habeas cases is directly applicable to the section 1983 claims presented here. The plaintiffs' claims have drawn the federal courts into an area where the federal interest is small and the costs to federal-state relations will be great.

The majority has lost sight of the fact that in our dual system, the states no less than the federal government are responsible for the protection of constitutional rights. Where a state criminal proceeding is involved, the Supreme Court has emphasized that the state's role is paramount. *See, e.g., Murray v. Carrier*, 106 S. Ct. 2639 (1986); *Rose v. Lundy*, 455 U.S. 509 (1982); *Sumner v. Mata*, 449 U.S. 539 (1981); *Wainwright v. Sykes*, 433 U.S. 72 (1977). Federal courts should act with caution where they are asked to create novel rights that intrude significantly on state functions. The lack of such caution is all the more startling here, where Virginia provides unit attorneys at its prison facilities to assist death row inmates and where Virginia courts are required to appoint counsel to represent such inmates in presenting nonfrivolous claims. *Darnell v. Payton*, 160 S.E.2d 749 (Va. 1968).

I can perceive no basis for the district court's decision other than a policy judgment that it would be a good idea to provide state inmates counsel at state expense to pursue state post-conviction remedies. That policy judgment may well be correct, but the judgment is for the state legislature, the state Attorney General's office, and the state courts to make, not the federal judiciary. We have been presented with much stimulating argument on the benefits that state-provided counsel would bring, but far less on the constitutional basis for requiring it. We have been invited to issue what is at bottom a legislative proclamation of displeasure with a controversial penalty which the Supreme Court has held is within the province of the states to impose.

The nature of the factual findings on which this proclamation would be based does not lessen my objections. The majority relies on the deference that is accorded to particularized findings of fact by trial courts. Yet the findings of fact in this case are broad generalizations. Indeed, if this case turns on the *individual* state of mind of the condemned prisoner, or the amount of time between conviction and imposition of a *particular* sentence, it is

difficult to see how the commonality requirement of Fed. R. Civ. P. 23 could ever have been met. The class action device undoubtedly widens the focus of a case, but it should not be taken as a grant of unlimited federal judicial authority.

Judicial legislation brings with it unique costs. By purporting to base the requirement of state post-conviction counsel in the Constitution, the court has created a rigid rule that may not readily be altered in the event of unforeseen results. Although the new right to post-conviction counsel does not appear to arise from the Sixth Amendment, it will presumably carry with it some entitlement to "effective assistance." Provision of counsel on constitutional grounds also brings with it a panoply of procedural requirements such as those at issue in *Finley, supra* (addressing procedural requirements for withdrawal of counsel under *Anders v. California*, 386 U.S. 738 (1967)). What is more, by analogy to previous "meaningful access" cases, future plaintiffs are likely to argue that they are entitled to counsel in section 1983 suits as well. *Cf. Wolff v. McDonnell*, 418 U.S. 539, 577-80 (1974). It is hard to imagine a more fertile ground for litigation than that provided by these entitlements. The likely result will be additional cycles of prisoner litigation in every capital case, each ever further removed from the proper focus of criminal adjudication — the trial itself.

State post-conviction remedies will now move one step closer to the status of a federal protectorate. The irony is that the development of state post-trial remedies has always held substantial promise that the states themselves would assume the primary responsibility for collateral review of state criminal convictions. If every state initiative is to involve yet another blanket of federal administrative oversight, the capacity and incentives for the states to undertake meaningful reforms will disappear. The guarantees of our Bill of Rights provide important federal safeguards for state criminal trials; they have not to this point been thought to impose a federal model of state post-conviction review.

Judge Chapman has asked to be shown as joining in this opinion.

WILKINS, Circuit Judge, concurring in part and dissenting in part:

The question before us is whether the Commonwealth of Virginia must automatically, upon request, provide death row inmates with appointed counsel to prepare and file state or federal post-conviction petitions in order to meet its obligation under *Bounds v. Smith*, 430 U.S. 817 (1977). Under the guise of meaningful access, the majority has established a right to appointed counsel where none is required by the Constitution. Therefore, while I concur with the majority that there is no right to assistance of counsel with regard to federal petitions, I respectfully dissent with regard to state petitions.

The district court clearly erred in concluding that the Commonwealth of Virginia was not meeting its obligation under *Bounds* to provide death row inmates with meaningful access to the courts. Further, there is no factual or legal justification for requiring a *per se* exception for this class of inmates.

I.

In *Bounds*, the Supreme Court held that the constitutional right of access to the courts is satisfied by providing inmates "adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. at 828. Except as to death row inmates, the fact that Virginia is in full compliance with *Bounds* is not disputed. Even the inmate who initiated this action, Giarratano, conceded that Virginia provides a "decent" law library which includes Federal Supplement, Federal Reports, United States Supreme Court Reporter, the Federal Digest, Virginia Reports, and the United States Code. Also, death row inmates are provided copies of the transcript, briefs, and state court opinion from the initial automatic appeal of their conviction.

In addition to satisfying the requirements of meaningful access by providing an adequate law library, Virginia also provides a system of institutional attorneys to assist inmates. Although the majority states that Virginia institutional attorneys, approximately two or three per facility, are "attempting to meet the needs of over 2,000 prisoners," the record does not establish how many of those prisoners are actually involved in post-conviction or other litigation. But the record does clearly

establish that all death row inmates have always been represented by counsel in state post-conviction proceedings.

Further, counsel is appointed under Va. Code Ann. § 14.1-183 (1950, Repl. Vol. 1985 & Supp. 1987) for any state post-conviction petition which raises a nonfrivolous issue and requires a hearing. Virginia also allows liberal amendment to *pro se* habeas corpus petitions. Plaintiffs' expert on Virginia post-conviction proceedings testified that he had no firsthand knowledge of a Virginia Circuit Court ever denying amendment to a habeas corpus petition in a capital case.

A. Meaningful Access and *Pennsylvania v. Finley*

After the district court rendered its decision the Supreme Court decided *Pennsylvania v. Finley*, 481 U.S. ___, 95 L.Ed. 2d 539 (1987). In that case the Court held that the procedures articulated in *Anders v. California*, 386 U.S. 738 (1967), which must be satisfied before appointed counsel may withdraw from a frivolous appeal, do not apply to state post-conviction proceedings because there is no constitutional right to counsel in those proceedings:

> *Anders* did not set down an independent constitutional command that all lawyers, in all proceedings, must follow these particular procedures. Rather, *Anders* established a prophylactic framework that is relevant when, and only when, a litigant has a previously established constitutional right to counsel.
>
> We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks to their convictions, and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.

Finley, 95 L.Ed.2d at 545 (citation omitted).

The majority concludes that "[t]he State's reliance on [*Finley*] as authority for their contention that state prisoners are not constitutionally entitled to state-supplied attorneys in post-conviction proceedings is misplaced." The majority seeks to distinguish *Finley* because it "was not a meaningful access case, nor did it address the rule enunciated in *Bounds v. Smith*. Most significantly, *Finley* did not involve the death penalty." These distinctions are unpersuasive in light of *Finley's* clear statement of existing law.

The decision in *Finley* relies heavily on *Ross v. Moffitt*, 417 U.S. 600 (1974). In *Ross*, the Supreme Court held that states are not required to appoint counsel for indigents seeking a writ of certiorari. In the plainest language the decision is grounded upon principles of meaningful access: "We do not believe that it can be said, therefore, that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking [discretionary] review in that court." *Id.* at 615.

The reasoning of *Ross* effectively compelled the result reached in *Finley:*

> We think that the analysis that we followed in *Ross* forecloses respondent's constitutional claim. The procedures followed by respondent's habeas counsel fully comported with fundamental fairness. Post-conviction relief is even further removed from the criminal trial than is discretionary direct review.... States have no obligation to provide this avenue of relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well.
>
> Nor was the equal protection guarantee of "meaningful access" violated in this case. ...In *Ross*, we concluded that the defendant's access to the trial record and the appellate briefs and opinions provided sufficient tools for the pro se litigant to gain meaningful access to courts that possess a discretionary power of review. We think that the same conclusion necessarily obtains with respect to post-conviction review.

Finley, 95 L.Ed.2d at 547 (citations omitted). In view of this language, I cannot agree with the majority that *Finley* was not a meaningful access case.

The result in *Finley* was compelled because there was no fundamental right to counsel in the first instance, a factor that was essential to the result reached. It was this, rather than the potentially distinguishable nature of the proceedings (appellate in *Anders* versus trial in *Finley*), which dictated the outcome. We are concerned here with the identical type of proceeding addressed in *Finley*, state habeas corpus, on the heels of a clear and recent statement by the Supreme Court that there is no previously established constitutional right to counsel in state

habeas corpus proceedings.

The majority would additionally distinguish *Finley* because it did not "address the rule enunciated in *Bounds v. Smith.*" In *Bounds* the issue was access to "sources of legal knowledge" to prepare meaningful papers, 430 U.S. at 817, and the Court explicitly stated that, for inmates seeking to file post-conviction papers, meaningful access to the courts can be satisfied by either providing adequate law libraries or "adequate assistance from persons trained in the law." *Id.* at 828. The rule of *Bounds* was not addressed in *Finley* because *Bounds* was not intended to imply a broad-based right of counsel as the majority now would have it interpreted. *Hooks v. Wainwright*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 93 L.Ed.2d 287 (1986).

The final basis upon which the majority seeks to distinguish *Finley* is that it did not involve the death penalty and "there is a significant constitutional difference between the death penalty and lesser punishments." *Beck v. Alabama*, 447 U.S. 625, 637 (1980). Therefore, the question is essentially whether on the record before us Plaintiffs constitute an exception to *Finley*, or justify an exceptional application of *Bounds*.

B. The Death Penalty and Virginia Procedures

It is now settled that a state may impose a sentence of death on a defendant convicted of aggravated murder. *Gregg v. Georgia*, 428 U.S. 153 (1976). Since *Gregg*, the Supreme Court has focused on "the procedures by which convicted defendants were selected for the death penalty rather than on the actual punishment inflicted." *Id.* at 179. The "significant constitutional difference" of which the majority speaks is invoked out of context. The "constitutional difference" is, under *Furman v. Georgia*, 408 U.S. 238 (1972) and subsequent decisions, essentially concerned with a sentencing system which must not be arbitrary and capricious in its application; that is, it must not be "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

Under *Furman*, the sentencing procedures considered were unconstitutional because the death penalty was, by virtue of unguided decision-making, "so wantonly and so freakishly imposed." *Id.* at 310. Thus, the "significant constitutional difference" mandated the establishment of procedures to ensure that circumstances under which individual sentences of death are imposed demonstrate a principled, consistent basis for the fact-

finding decision, and a greater degree of reliability than is required in noncapital sentencing. *See Gregg*, 428 U.S. at 206-07; *Beck v. Alabama*, 447 U.S. at 637-38 ("significant constitutional difference" means that the procedural rules by which a sentence of death is imposed must not diminish the reliability of the sentencing phase of the proceeding, or the guilt phase upon which it is predicated); *Booth v. Maryland*, 482 U.S. ___, 96 L.Ed.2d 440 (1987) (a state statute that requires consideration of a victim impact statement at the sentencing phase of proceedings creates an unconstitutional risk of a death sentence based upon impermissible or irrelevant considerations); *Ford v. Wainwright*, 477 U.S. 399, 425 (1986) (Powell, J., concurring) ("heightened procedural requirements on capital trials and sentencing proceedings" do not apply in the context of post-sentencing proceedings). This "difference," significant as it is, is not a basis upon which we may begin implying a separate panoply of additional constitutional standards only applicable to collateral challenges in death penalty cases. *See Strickland v. Washington*, 466 U.S. 668, 686-87 (1984) (in both capital and noncapital cases, the same principle governs claims as to effective assistance of counsel).

The Commonwealth of Virginia allows a sentence of death only in cases of aggravated murder. Va. Code Ann. § 18.2-31 (1950, Repl. Vol. 1982 & Supp. 1987). Appeal is automatic from a sentence of death, Va. Code Ann. § 17-110.1A (1950 & Repl. Vol. 1982), and procedural safeguards in excess of that required by the Constitution are provided, such as proportionality review of the sentence imposed in each case. Va. Code Ann. § 17-110.1C.2 (1950 & Repl. Vol. 1982); *compare Pulley v. Harris*, 465 U.S. 37, 50-51 (1984) ("There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it."). At trial and on the first appeal of right, the defendant is guaranteed the assistance of appointed counsel as required by the Constitution. The Constitution does not provide a right to counsel appointed at state expense in subsequent proceedings, *Ross*, 417 U.S. at 610-11; *Finley*, 95 L.Ed.2d at 545, although a state may as a matter of legislative choice make counsel available to convicted defendants at all stages of judicial review. *Ross*, 417 U.S. at 618. It is significant that the issue of counsel arose in *Finley* solely because Finley sought to expand a state policy Pennsylvania has followed

since 1967 which "imposes a mandatory requirement upon the trial court to appoint counsel for an indigent post conviction applicant." *Commonwealth v. Mitchell*, 427 Pa. 395, 235 A.2d 148, 149 (1967); *see Finley*, 95 L.Ed.2d at 548. Similarly, Virginia courts may appoint counsel to assist in state post-conviction proceedings, Va. Code Ann. § 14.1-183 (1950, Repl. Vol. 1985 & Supp. 1987), and are required to appoint counsel in cases involving nonfrivolous claims that require an evidentiary hearing. *Darnell v. Peyton*, 160 S.E.2d 749 (1968). The Virginia procedure is similar to the procedure followed in the federal courts for review of state prisoner petitions under 28 U.S.C.A. § 2254 (West 1977). *Rules Governing Sec. 2254 Cases*, Rule 8(a), (c).

II.

In addition to there being no fundamental right to automatic appointment of counsel, there is no factual basis to support the majority's extension of *Bounds*. Under *Anderson v. Bessemer City*, 470 U.S. 564 (1985), we must accept the district court's findings of fact unless clearly erroneous. The district court's *per se* exception to the standards of *Bounds* is grounded on three premises, none of which are supported by the record: emotional instability of death row inmates as a result of the circumstances of their confinement; the degree of legal complexity unique to death penalty cases; and severe time constraints before execution of sentence.

As to the first premise, the thought of execution may exact an emotional toll. But, the district court's conclusion that death row inmates are rendered incapable of initiating post-conviction petitions is simply not supported by the facts presented. For example, Giarratano has successfully prosecuted other *pro se* actions while on death row. *See Giarratano v. Bass*, 596 F. Supp. 818 (E.D. Va. 1984). And counsel for the inmates conceded during oral argument, "the record does not contain evidence of specific inmates, currently or in the past," where this premise applies.

The record additionally fails to establish that there is a unique legal complexity to death penalty cases. Though the facts and issues of criminal cases are of varying complexity, "the legal standards for constitutionally effective assistance of counsel are constant." *Washington v. Watkins*, 655 F.2d 1346, 1357 (5th Cir.

1981), *cert. denied*, 456 U.S. 949 (1982). Indeed, the same argument of "complexity" could be advanced by other inmates to compel appointment of counsel in noncapital post-conviction murder cases to raise complex issues involving burden-shifting presumptions, or by federal inmates prosecuted under 18 U.S.C.A. § 1963 (West 1984 & Supp. 1987) (RICO) or 21 U.S.C.A. § 848 (West 1981 & Supp. 1987) (Continuing Criminal Enterprise). Further, other than the occasional reference to the "esoteric," "intricate" or "frequently sophisticated" nature of capital cases, the complexity addressed in this record refers to factual complexity and the need for factual "re-investigation." This obscures the fact that the standards of assessing the fairness of a capital prosecution are the same as those for other criminal cases, *Strickland v. Washington*, 466 U.S. 668 (1984), as well as the fact that the purpose of the right to counsel is not to provide a defendant with a private investigator. *United States v. Gouveia*, 467 U.S. 180, 191 (1984). Plaintiffs' witnesses also described two cases purportedly demonstrating the need for complete factual re-investigation, but later conceded that in each instance the habeas corpus petition was actually based on information gained from the transcript of trial. Finally, during oral argument the inmates' counsel agreed that the record did not contain a single example of a case or issue which would provide a basis for the district court's conclusion, nor could one, understandably, be posited by way of illustration.

As to the third premise, the evidence presented does not indicate that Virginia death row inmates are given a limited amount of time to prepare and present their petitions to the courts. Rather, the evidence establishes the contrary. For example, the initiating Plaintiff of the class, Giarratona, has been on death row in Virginia for eight years. The record indicates that a substantial period of time passed between the affirmance of his conviction by the Virginia Supreme Court and the initiation of state or federal habeas corpus proceedings. Another inmate in the class, James Clark, has been on death row since 1979. *Clark v. Commonwealth*, 219 Va. 237, 257 S.E.2d 784 (1979), *cert. denied*, 444 U.S. 1049 (1980). His sentence was vacated on a state habeas corpus petition, based on an initial finding of ineffective assistance of counsel. This finding was reversed by the Supreme Court of Virginia in June, 1984 and the trial court was "directed to fix a date for Clark's execution." *Virginia Dep't of Corrections*

v. Clark, 277 Va. 525, 318 S.E.2d 399, 406 (1984). Testimony of Clark's counsel established that efforts on his behalf are ongoing.

The history of inmates on death row in the Commonwealth of Virginia is consistent with the histories of capital cases throughout the nation. U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin, *Capital Punishment, 1986* at 1, 8. It is not uncommon to find death penalty cases which have been in litigation for as much as "a full decade, with repetitive and careful reviews by both state and federal courts," as well as by the Supreme Court. *Sullivan v. Wainwright*, 464 U.S. 109, 112 (1983) (application for stay of execution denied); *Songer v. Wainwright*, 469 U.S. 1133 (1985) (Brennan, J., dissenting from denial of petition for certiorari to review sentence of death imposed in 1974). The facts, other reliable data, and common experience all show significant delay rather than a "limited amount of time" in death penalty cases.

III.

Under the majority's analysis Virginia death row inmates are to be automatically provided counsel upon request for preparing state habeas corpus petitions, but are denied this right for preparation of federal habeas petitions. I concur in the majority's conclusion that the Constitution does not require automatic appointment of counsel for the latter, but I disagree with the reasoning. The majority bases its distinction in treatment upon the fact that federal habeas proceedings are analogous to the situation in *Ross* in which a claim for appointed counsel to seek a writ of certiorari was rejected because of availability of appellate briefs, a transcript and state court opinions. The distinction obscures the fact that inmates will also routinely have appellate briefs, a transcript, and state court opinions in mounting a challenge to their conviction in state court. They will also be pursuing claims under liberal pleading and amendment rules that are essentially the same as those followed in the federal courts, and will in fact be provided counsel under essentially the same standard in both the state and federal courts in Virginia.

IV.

In testimony before the district court there was reference to

an agency created by the State of Florida to handle post-conviction capital cases in that state. The district court apparently concluded that this would be appropriate for the Commonwealth of Virginia, and has effectively ordered it to create such an agency. While the Commonwealth of Virginia and other states may elect to adopt this procedure, we have no authority to order it. Federal courts are not empowered to act as "a roving commission to impose. . .[our] own notions of enlightened policy. . . . [T]he question for decision is not whether we applaud or even whether we personally approve the procedures followed in [this case]. The question is whether those procedures fall below the minimum level the [Constitution] will tolerate." *Spencer v. Texas,* 385 U.S. 554, 569 (1967) (Stewart, J., concurring). The record before us clearly demonstrates that Virginia's procedures more than satisfy constitutional requirements.

I therefore dissent from the majority's rule requiring automatic appointment of counsel upon request for assistance in preparing state habeas corpus petitions. I concur in the majority's decision not to apply this rule with regard to preparation of federal habeas corpus petitions.

Judge Widener, Judge Chapman and Judge Wilkinson have asked to be shown as joining in this separate opinion.

In the United States District Court For the Eastern District of Virginia Richmond Division

JOSEPH M. GIARRATANO, et al.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. No. 85-0655-R**
EDWARD W. MURRAY, et al.,	)	
Defendants.	)	

FINAL JUDGMENT ORDER

For the reasons stated in the accompanying Memorandum this day filed, and deeming it just and proper so to do, it is hereby ADJUDGED and ORDERED as follows:

1. The Court declares that indigent Virginia death row inmates are entitled to the appointment of counsel upon request to assist them in pursuing habeas corpus relief in the state courts.

2. The defendants shall develop a system whereby attorneys may be appointed to the death row inmates individually as provided above.

3. The plaintiffs are entitled to their taxable costs and attorneys fees as provided by law.

4. Counsel for the respective parties shall attempt to reach agreement as to counsel fees. Any such agreement shall be without prejudice to defendants' right to contest the right of plaintiffs to recover same.

This action shall, upon agreement or order as to counsel fees stand dismissed with leave to the plaintiffs to petition, for good cause shown, to reopen same for purposes of effectuating the requirements of this decree.

Let the Clerk send copies of this order and the accompanying memorandum to all counsel of record.

/s/ Richard L. Williams

UNITED STATES DISTRICT JUDGE

Date DEC 18 1986

In the United States District Court
For the Eastern District of Virginia
Richmond Division

JOSEPH M. GIARRATANO, et al.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. No. 85-0655-R**
EDWARD W. MURRAY, et al.,	)	
Defendants.	)	

MEMORANDUM

The plaintiffs in this matter, a class consisting of certain present and future death row inmates, have filed suit pursuant to 42 U.S.C. § 1983 against various officials of the Commonwealth of Virginia. The jurisdiction of this Court is premised on 28 U.S.C. §§ 1331 and 1343. Plaintiffs' contention is that Virginia is constitutionally required to provide them with counsel in post-conviction proceedings such as petitions for writs of certiorari to the United States Supreme Court or habeas corpus.

Background

Plaintiff Giarratano originally brought this action seeking declaratory and injunctive relief with respect to post-conviction assistance of counsel. After permitting other death row inmates to intervene in the suit, the Court granted plaintiffs' motion for class certification. The class consists of

> ...all persons, now and in the future, sentenced to death in Virginia, whose sentences have been or are subsequently affirmed by the Virginia Supreme Court and who either (1) cannot afford to retain and do not have attorneys to represent them in connection with their post-conviction proceedings, or (2) could not afford to retain and did not have attorneys to represent them in connection with a particular post-conviction proceeding.

There are currently thirty-two inmates on Virginia's Death Row.

After full trial on the merits, the Court took the case under

advisement and permitted the parties to file post-trial briefs and other memoranda. Being in receipt of those filings, the Court is now prepared to render its decision.

Merits

Plaintiffs assert a number of federal constitutional grounds to support their claim that they are entitled to post-conviction assistance of counsel. These grounds encompass the equal protection clause, the sixth amendment, the eighth amendment, Article I, and the due process clause of the fourteenth amendment, as well as the right of access to the courts enunciated in *Bounds v. Smith,* 430 U.S. 817 (1977). Although the Court entertains serious doubts as to the viability of many of these theories, it is satisfied that the United States Supreme Court's decision in *Bounds* dictates that the plaintiffs here be granted some form of relief. Consequently, the Court will not address the remaining grounds.

1. *Bounds v. Smith*

In *Bounds,* the Supreme Court considered a section 1983 action filed by prison inmates who sought legal research facilities to assist them in filing habeas corpus petitions and section 1983 claims. The inmates alleged that North Carolina, by failing to provide such facilities, denied access to the courts in violation of the fourteenth amendment.

The Supreme Court agreed, holding that prison authorities are required "to assist inmates in the preparation and filing of meaningful legal papers" by providing prisoners with either adequate law libraries or assistance from legally trained personnel. *Bounds, supra,* 430 U.S. at 828. Rejecting the argument that states could not be obligated to expend funds to effectuate such a right, the Court noted that its previous decisions "have consistently required states to shoulder affirmative obligations to assure *all* prisoners meaningful access to the courts." *Id.* at 824 (emphasis added).

The Court noted that "meaningful access" is the touchstone. *Id.* at 823. The Court expounded upon this concept by phrasing the issue as "whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental rights to the courts." *Id.* at 825. In concluding that the assistance was required, the Court implicitly rejected the argument that inmates are ill-equipped to use law libraries. The Court noted in passing

that "this Court's experience indicates that *pro se* petitioners are capable of using lawbooks to . . ." raise legitimate claims. *Id.* at 826. This assumption provided the basis for the alternative nature of the required relief: trained legal assistance *or* adequate law libraries.

In the present case, however, the evidence at trial demonstrated that this assumption is invalid with respect to death row prisoners in Virginia. Three considerations underlie this determination.

The first is the limited amount of time death row inmates may have to prepare and present their petitions to the courts. In Virginia, appeal of right lies to the Virginia Supreme Court in all cases in which the death penalty is imposed. Va. Code § 17-110.1. Once the conviction and sentence are affirmed, the sentence may be carried out at any time, provided thirty days has elapsed since the imposition of sentence. Va. Code § 53.1-232. While stays of execution may be secured in appropriate cases to enable a prisoner to prepare a petition for a writ of habeas corpus in the state (and later federal) courts, the result is that a large amount of legal work must be compressed into a limited amount of time. Even assuming that a death row inmate would be intellectually capable of such a task, it is beyond cavil that a prisoner unversed in the law and methods of legal research would need much more time than a trained lawyer to explore his case. *See Williams v. Leeke,* 584 F. 2d 1336, 1339 (4th Cir. 1978).

The second consideration is the complexity and difficulty of the legal work itself. In Virginia, the capital trial is bifurcated, entailing separate proceedings to determine guilt and to set the appropriate punishment. Aside from analyzing the voluminous transcript of the guilt determination phase which not infrequently lasts several days, a great deal of time must be devoted to analyzing the issues of mitigation and aggravation characteristic of the sentencing phase of a capital case.

The third consideration is that at the time the inmate is required to rapidly perform the complex and difficult work necessary to file a timely petition, he is the least capable of doing so. The evidence gives rise to a fair inference that an inmate preparing himself and his family for impending death is incapable of performing the mental functions necessary to adequately pursue his claims.

Based upon these considerations, the Court finds that the

plaintiffs are incapable of effectively using lawbooks to raise their claims. Consequently, the provision of a library does little to satisfy Virginia's obligation to "assist inmates in the preparation and filing of meaningful legal papers" with respect to Virginia death row prisoners. *See Bounds, supra,* 430 U.S. at 828. Accordingly, Virginia must fulfill its duty by providing these inmates trained legal assistance. *Id.* Therefore, the Court now turns to an examination of the assistance presently provided by Virginia to determine whether this constitutional requirement is met.

2. Virginia's Current Assistance

Virginia presently provides two forms of trained legal assistance to death row inmates pursuing post-conviction claims. Virginia provides for the appointment of attorneys to the various penal institutions to assist inmates in any matter related to incarceration, *see* Va. Code § 53.1-40, and Virginia provides for the appointment of counsel under certain circumstances to indigents who have resided in Virginia continuously for six months, *see* Va. Code § 14.1-183. These provisions will be analyzed in light of the Commonwealth's obligation to provide meaningful access to the courts.

First, pursuant to the Virginia Code, attorneys have been assigned to each institution to assist all inmates in matters related to incarceration. The defendants allege that these institutional attorneys provide the trained legal assistance mandated by *Bounds.* This allegation is not without support. *See, e.g., Williams v. Leeke,* 584 F.2d 1336, 1339 (1978) (Virginia's system of making lawyers regularly available to prisoners for consultation and advice satisfies duty under *Bounds*). With respect to death row prisoners, however, the Court finds that the assistance these attorneys are able to provide is inadequate both in fact and in law.

Currently there are seven institutional attorneys attempting to meet the needs of over 2,000 prisoners. No pretense is made by the defendants in this case that these few attorneys could handle the needs of death row prisoners in addition to providing assistance to other inmates. Although no institutional attorney has helped to prepare the habeas corpus petition of a single death row inmate, the testimony at trial indicated that each attorney could not adequately handle more than one capital case at a time. Moreover, they are not hired to work full time; they split time

between their private practice and their institutional work.

Even if Virginia appointed additional institutional attorneys to service death row inmates, its duty under *Bounds* would not be fulfilled. The scope of assistance these attorneys provide is simply too limited. The evidence indicated that they do not perform factual inquiries of the kind necessitated by death penalty issues. They act only as legal advisors or, to borrow the phrase of one such attorney, as "talking lawbooks." Additionally, they do not sign pleadings or make court appearances. *See Peterson v. Davis,* 421 F. Supp. 1220 (E.D. Va. 1976), *aff'd,* 562 F.2d 48 (4th Cir. 1977).

For death row inmates, more than the sporadic assistance of a "talking lawbook" is required to enable them to file meaningful legal papers. With respect to these plaintiffs, the Court concludes that only the continuous services of an attorney to investigate, research, and present claimed violations of fundamental rights provides them the meaningful access to the courts guaranteed by the Constitution. Having determined that the assistance of institutional attorneys falls short of this requirement, the Court now turns to the second form of assistance provided by Virginia.

As the Court has indicated, supra, in addition to institutional attorneys, Virginia courts are authorized to appoint counsel to individual inmates pursuant to the following provision:

> Any person, who has been a resident of this State for a continuous period of six months, who, on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein, without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees to them therefor, except what may be included in the costs recovered from the opposite party.

Va. Code § 14.1-183.[1] Although such limitations do not appear

[1] The Commonwealth has argued that at least part of the plaintiffs' incentive in bringing this action is not its opposition to appointment of counsel pursuant to this section, but its objection to state court appointment of counsel of a petitioner's choosing. This contention, however, is not supported by the evidence. In at least one instance, in a matter before the Circuit Court of Clarke County, the Commonwealth's counsel contended, unsuccessfully, that the Court had no authority to appoint counsel in a habeas corpus proceeding. Consequently, the availability of such counsel is as much at issue as their efficacy.

on the face of the statute, appointments are made under this provision only after a petition is filed and then only if a non-frivolous claim is raised.[2] *See Cooper v. Haas*, 210 Va. 279, 170 S.E.2d 5 (1969); *Darnell v. Peyton*, 208 Va. 675, 160 S.E.2d 749 (1968).

Aside from the obvious residency restriction, the timing of the appointment is a fatal defect with respect to the requirements of *Bounds*. Because an inmate must already have filed his petition to have the matter of appointed counsel considered, he would not receive the attorney's assistance in the critical stages of developing his claims. See *Bounds, supra*, 430 U.S. at 828 n. 17. Consequently, attorneys appointed pursuant to this statute are, by reason of the lateness of the appointment, unable to provide all of the required assistance.

To summarize, the pre-petition assistance provided by institutional attorneys is too limited while the post-petition appointment of counsel is untimely. Nor do these provisions viewed together prove adequate. Although ample assistance is provided at trial and on appeal, the requisite aid in preparing the petition itself is absent. The matter of a death row inmate's habeas corpus petition is too important — both to society, which has a compelling interest in insuring that a sentence of death has been constitutionally imposed, as well as to the individual involved — to leave to, what is at best, a patchwork system of assistance. These plaintiffs must have the continuous assistance of counsel in developing their claims.

In the past, Virginia had no need to take affirmative action

[2] Even assuming that all death row inmates with meritorious claims are capable of filing a petition with at least one non-frivolous ground (an assumption somewhat at odds with the Court's findings), the delay in receiving comprehensive assistance of counsel, as discussed below, may be devastating. Under Virginia law, all claims, the facts of which are known to the petitioner at the time of filing, must be included in that petition or they may not be raised successfully in a subsequent filing. Va. Code § 8.01-654(B)(2). Because federal courts generally may not consider claims that are barred by Virginia procedural rules, *see Whitley v. Bair*, No. 85-4005 (4th Cir. Oct. 6, 1986), those omitted claims would not be considered by a federal forum as well. Finally, the Supreme Court expressly noted that because the "main concern here is 'protecting the ability of an inmate to prepare a petition . . . ,' it is irrelevant that [the state] authorizes expenditures of funds for appointment of counsel in some state post-conviction proceedings for prisoners whose claims survive initial review by the courts." *Bounds, supra*, 430 U.S. at 828 n.17 (citation omitted).

to provide counsel to inmates pursuing post-conviction relief. Attorneys volunteered their services or were recruited to provide pro bono assistance and representation to death row prisoners. Those days are gone. The evidence conclusively establishes that today few — very few — attorneys are willing to voluntarily represent death row inmates in post conviction efforts. One lawyer who did accept such a case testified that he expended in excess of five hundred hours in the preparation and handling of it. He expressed the emotional drain to be such as to preclude his willing acceptance of another such assignment.

The stakes are simply too high for this Court not to grant, at least in part, some relief. In view of the scarcity of competent and willing counsel to assist indigent death row inmates in their exercise of seeking post conviction relief, some relief is both necessary and warranted. The reluctance of competent counsel in reference to these matters requires at a minimum the supervision of a Court in the appointment of competent counsel.

Because Virginia already appoints counsel to those inmates who file habeas corpus petitions containing non-frivolous claims, the relief granted today requires only a slight modification of the current assistance. Virginia need only appoint counsel to death row inmates who request such assistance before the petition is filed in order to comply. This modification should not impose an onerous burden on the Commonwealth. Given the relatively small number of inmates added to Virginia's death row each year, the additional cost to the state should be relatively small.[3]

Having concluded that state appointed counsel is required, the Court must address the full scope of the necessary assistance.

3. The Scope of the Requisite Assistance

Plaintiffs seek state appointed counsel to prepare and argue petitions for both writs of certiorari to the Supreme Court and writs of habeas corpus in state and federal courts. Consequently, there are two dimensions to the requested relief that must be defined: first, whether the nature of the assistance encompasses petitions for certiorari as well as habeas corpus; and second,

[3] While economic factors may be given some consideration by the Court, the cost of protecting a constitutional right cannot in itself be dispositive. *See Bounds, supra*, 430 U.S. at 825.

whether the assistance extends to both state and federal courts.[4]

Whether the right of access extends to assistance in filing petitions for writs of certiorari to the Supreme Court was not addressed in *Bounds*. In *Ross v. Moffitt*, 417 U.S. 600 (1973), however, the Supreme Court did consider whether the due process clause of the fourteenth amendment required appointment of counsel in such cases. In *Moffitt*, the Court first analyzed the line of cases later relied on in *Bounds* to define the right of access. The Court held, however, that appointment of counsel was not required for petitioners seeking discretionary review. Part of *Moffitt's* rationale was that a court addressing a discretionary review petition is not primarily concerned with the correctness of the judgment below, but rather the jurisprudential importance of the issues involved. *See Moffitt, supra*, 417 U.S. at 617.[5]

Pursuant to *Moffitt*, therefore, this Court concludes that assistance in the filing of petitions for writs of certiorari is not required.

The second issue, whether state appointed counsel must assist in both state and federal habeas proceedings, has never been directly addressed by the Supreme Court. *Bounds* and *Moffitt*, however provide ample, albeit conflicting, guidance. Although the question is far from settled, this Court believes that the relief granted should be limited to state post-conviction proceedings.

In *Moffitt*, the Supreme Court, in rejecting a claim that the states must appoint counsel for indigents seeking a writ of certiorari, made two observations that are relevant here. First, the court noted that, in contrast to the situation in which a state itself

[4] In light of the determination, discussed infra, that the reasoning in *Ross v. Moffitt*, 417 U.S. 600 (1973), governs the disposition of these two issues, the Court is of the view that changing the theory under which relief is sought would not alter the analysis. Consequently, the additional grounds raised by the plaintiffs need not be addressed separately from the access theory of *Bounds*.

[5] Additionally, the Court reasoned that pro se petitioners can present their claims adequately for discretionary review because they already have had counsel for their initial appeals of right and are thus likely to have appellate briefs, trial transcripts, and intermediate court opinions at their disposal. *See Moffitt, supra*, 417 U.S. at 615-18; *Bounds, supra*, 430 U.S. at 821. The *Moffitt* court also indicated a difficulty in finding constitutionally required state-appointed counsel for federal statutorily created review. *Moffitt, supra*, 417 U.S. at 617-18.

provides an avenue of review, it would be anomolous to require a state to provide counsel to one seeking federal statutorily created relief.[6] *Moffitt, supra*, 417 U.S. at 617-18. As with the writ of certiorari, the right to seek federal habeas corpus relief is not granted by the state, but rather by Congress. *See* 28 U.S.C. § 2254.[7]

Second, in considering a petition for a writ of certiorari, the Court observed that it would have available the appellate brief prepared by counsel, a transcript, and the opinion of any state courts that had addressed the issues. *Moffitt, supra*, 417 U.S. at 616. Similarly, in light of the exhaustion requirement,[8] a federal court considering a petition for habeas corpus would likewise have the brief of counsel, a transcript, and opinions from the Virginia courts that have considered the matters. In sum, the reasoning in *Moffitt* indicates that relief here should be limited to appointment of counsel in state habeas proceedings.

The result in *Bounds*, however, conflicts with this reasoning. In *Bounds*, the court did not distinguish between federal and state habeas proceedings in ordering the creation of libraries or assistance programs to aid inmates in filing petitions. The Court, however, did not expressly address the instant issue or the concern expressed in *Moffitt*.

On the basis of the teachings of *Moffitt, supra*, this Court is of the view that relief should be limited to state habeas proceedings. Such a legal conclusion does not, however, signify that an indigent death row petitioner will be denied the assistance of counsel in federal court. Pursuant to 28 U.S.C. § 1915, the federal courts are empowered to appoint counsel under certain circum-

[6] The Supreme Court noted that "the argument . . . that the state having once created a right of appeal must give all persons an equal opportunity to enjoy the right, is by its terms inapplicable." *Moffitt, supra*, 417 U.S. at 617 (referring to *Griffin v. Illinois*, 351 U.S. 12 (1956) and *Douglas v. California*, 372 U.S. 353 (1963)).

[7] "Although federal habeas corpus relief is provided for by statute, it has a constitutional dimension as well. As noted by the late Judge Tamm in *Palmore v. Superior Court of the District of Columbia*, 515 F.2d 1294, 1301 (1975), *vacated and remanded*, 429 U.S. 915 (1976), "[h]abeas corpus holds a unique position in our constitutional scheme. It is nowhere directly constitutionally endowed, but the Constitution, through the suspension clause, protects against its interference."

[8] *See* 28 U.S.C. § 2254(b).

stances to indigent litigants before them.[9] Consequently, a death row inmate may continue to receive legal assistance in pursuing his claims in federal court.

As a final matter, the evidence at trial indicated that the substitution of counsel at the doors of the federal courthouse would have catastrophic effects on the ability of the new attorney to adequately prepare and present an inmate's claims in the short time provided. These concerns need not be addressed at present, however, for the Court envisions little difficulty in the creation of a system of representation in which the same attorney may provide representation in both state and federal courts, but is compensated by different sources for efforts in each.

Conclusion

For the reasons stated above, the Court will order Virginia to develop a program whereby counsel is appointed upon request to death row inmates who cannot afford to retain and do not have an attorney to represent them in connection with pursuing habeas corpus relief in the state courts.

An appropriate order shall issue.

/s/ Robert R. Merhige, Jr.

UNITED STATES DISTRICT JUDGE

Date DEC 18 1986

[9] Such appointment would come only after the inmate has filed his § 2254 petition. *Cf. Gordon v. Leeke*, 574 F.2d 1147, 1153, *cert. denied*, 439 U.S. 970 (1978) (district court should appoint counsel to assist a *pro se* litigant who raises a colorable claim but lacks the capacity to present it).